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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1446

JOAN ROE, PETER POE AND COE PRESS, INC.,

Petitioners,

v.

JANE DOE,

Respondent.

MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Preliminary Statement

The Association of American Publishers, Inc. (hereinafter referred to as the "AAP") hereby seeks leave to file a brief *amicus curiae*, pursuant to Rule 42 of the Rules of the Supreme Court in support of petitioners. Counsel for petitioners has granted consent to the filing of a brief by the AAP, but counsel for respondent has declined to grant such consent.

Interest of the AAP

The AAP is a not-for-profit trade association organized under the laws of New York State and is composed of more than 200 publishers of general books, textbooks, medical books and educational materials. It is estimated that its members publish approximately 85% of all such books and materials produced in the United States.

This case is on review from the granting of a preliminary injunction by the Supreme Court, New York County, at Special Term, which injunction was modified and affirmed by the Appellate Division, First Department and which, as modified, was affirmed without opinion by the New York Court of Appeals. The injunction is a prior restraint on the distribution of a book written by two of the petitioners and published by the third. The injunction was granted at the request of the respondent on the allegation that the book, which concededly is a psychiatric case history of the respondent and her family, is a violation of her right of privacy.

None of the parties in this proceeding is or has been a member of the AAP, including the publisher in question, and neither the AAP nor any of its members has any direct business interest in the distribution of the book in question. Nonetheless, the granting of a preliminary injunction by the courts below is of grave concern to the AAP and its members.

Although the competing interests of informing the public and protecting confidences are not exclusively faced

by publishers of medical or scientific works, it should be noted that approximately twenty of the AAP's members do publish some medical texts and of those twenty, three do so almost exclusively. Moreover, there are some thirty non-AAP member publishers engaged in the publication of medical and scientific books. That the case history method of disseminating information and teaching is as standard and important in medicine as in law is a matter of judicial notice. Indeed, every year a significant number of books including case histories are published by AAP members and others. Some of these, such as the well-known works of Masters and Johnson, are distributed to lay audiences and provide valuable information to those outside of the medical-scientific communities. As noted by Special Term in its opinion, it is "a well established practice in the medical profession for physicians to publish reports of interesting cases . . . and Freud published accounts of the analysis of some of his patients in this way."

The AAP's member publishers, as a matter of policy, believe that such case histories should be published only when consent is granted and/or where the author has disguised the subject of the work sufficiently to avoid identification. By applying these criteria, the potential privacy/First Amendment conflict resulting from the publication of case histories need not be an intractable problem.

In this case, Special Term found the facts, in pertinent part, to be as follows:

> "Defendants claim that the book is of scientific value; I do not think it is for judges to rule that it is not.

> And defendants have taken some steps to disguise the identity of the patients. I think those steps reasonably meet the usual standards for such disguising of the patients' identities. While I have not read this 1,000 page book, the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones; I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient."

The AAP submits, therefore, that since the publication reasonably disguised the identity of the respondent in accordance with "usual standards", there was no basis to overcome the First Amendment prohibition against prior restraints of the dissemination of information in the form of a book.

A prior restraint on the distribution of a book of scientific value was, thus, here granted with only the most fleeting reference to the First Amendment prohibition against such restraint in two of the lower courts—which wrote a total of five pages on the entire case—and with no opinion whatsoever by the Court of Appeals of the State of New York. In short, the courts below failed to give sufficient weight to the dictates and principles of the First Amendment and they failed to honor the "heavy presumption against . . . constitutional validity" of "prior restraints of expression." (*Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963)).

The AAP notes that the brief of respondent in opposition to the Petition for Certiorari is devoted heavily to contesting the facts found below. Should this Court determine, as respondent contends, that consent was not given,

that reasonable steps to disguise respondent's identity were not taken, that respondent is identifiable and that immediate, direct and irreparable harm will result to respondent if the injunction is not continued, then, under all of these circumstances, a prior restraint such as that granted below might be warranted. To sustain a prior restraint against a book in the face of a privacy claim on any other basis would be to enhance the publisher's risk to such an intolerable extent that books of scientific value utilizing case histories simply will not be published. And, if because of injunctions such as that granted below, publishers as a group are deterred from publishing case histories where the identities are reasonably disguised, the public at large will suffer and the First Amendment shall have failed in its historic purpose.

In view of the foregoing, the AAP seeks leave to file the brief following hereafter.

Respectfully submitted,

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Interest of the AAP

This is set forth above in the motion to the Court.

ARGUMENT

POINT I

The courts below failed to accord the First Amendment the priority that this Court has repeatedly required.

Although the courts below, with the notable exception of the Court of Appeals which affirmed without opinion, make fleeting references to the First Amendment guarantees, the AAP believes that they failed to give to those guarantees the weight and importance to which they are entitled and which, indeed, are required by any number of opinions of this Court. In short, the State courts failed to acknowledge the firstness of the First Amendment.*

The need for the press to flourish has been so consistently recognized by this Court that it has continually acknowledged that some abuse is inevitable and must be tolerated. Most recently, Mr. Justice Powell reiterated this tenet in his opinion for the Court in *Gertz* v. *Robert Welch, Inc.*, 42 USLW 5123, 5128 (1974), wherein he stated:

> "As James Madison pointed out in the Report on the Virginia Resolutions of 1798, 'Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press.' 4 Elliot's Debates (1876), p. 571. And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press."

* See *e.g.*, F. Frankfurter, Mr. Justice Holmes and the Supreme Court, 74-76 (2d ed. 1961).

The New York courts appear to have either ignored or rejected this fundamental tenet of our system. Their treatment of the case simply indicates that their concern with potential personal harm to respondent caused them to discount First Amendment dictates.

The priority of the First Amendment protections applies to all types of speech, not just political speech. And clearly it applies to the non-fictional content of the book here in question. As stated by Mr. Justice Harlan in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 147 (1967): "The founders . . . felt that a free press would advance 'truth, science, morality, and arts in general' as well as responsible government." And in *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), the Court stated:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Of course, the guarantees of the First Amendment include not only the right of the author and publisher to express and disseminate information, but even more importantly, the right of the public to obtain access to and receive information. And the information to which the public is entitled is not simply information of a political nature. Indeed, it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969); cf. *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967).

The issue in *Time, Gertz* and other cases coming to this Court in the privacy or defamation areas has been that of liability *after* publication for money judgments. Although those cases did not deal with the serious prior restraint issue here in question, the Court's concern with the freedom of the press was manifest. In considering the existence or potential for large judgments imposed against the press, this Court has been vigilant to prevent the erosion of First Amendment rights through the chilling effect of the imposition or the potential risk of large judgments.*

Here, of course, the First Amendment claim is far more direct than that of a potential chilling effect. The actual dissemination of the ideas and information contained in the book in question has been stopped by reason of the injunction granted below. Yet it is important to remember that the injunction against distribution of this book, while direct in restraining its further dissemination, also has a chilling effect on the willingness of other publishers to publish other works utilizing case histories. The injunction granted below, based as it is on the facts as found by the courts below, may well instill fear in other publishers causing them to turn down possibilities of publication and/or distribution.**

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* Accordingly, in *Gertz, supra,* this Court has now held that presumed or punitive damages may not be recovered in libel cases in the absence of a showing of knowledge of falsity or reckless disregard for the truth and that, for any recovery, fault of some degree must be shown.

** Special Term found that respondent's identity had been reasonably disguised in accordance with "usual standards." The AAP believes this is indeed the procedure applied by responsible publishers of case history type publications.

In failing to recognize the full scope and clear preeminence of the First Amendment in the issues of the case before it, the courts below violated basic constitutional commands which, if not corrected by this Court, will severely impair the rights of all publishers and the reading public at large.

POINT II

The preliminary injunction granted below constitutes an invalid prior restraint.

In discussing the validity of the preliminary injunction granted below, the opinions of the Special Term and the Appellate Division tacitly admit that the preliminary injunction here in issue does constitute a prior restraint. And, indeed, it does.*

Valid prior restraints are exceptions to the rule. The elimination of prior restraints was a single "leading purpose" of the First Amendment.** The constitutional invalidity of prior restraints was set forth succinctly by

* Any contention that the restraint here is not "prior" because the injunction only issued after publication and after distribution of a few hundred copies is fallacious. In *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175 (1968); and *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971) the expression as to which those injunctions applied had already occurred and yet, this Court reversed those injunctions as invalid prior restraints. Moreover, in *Near* the injunction was permanent, not preliminary; and in *Keefe* the injunction was found by this Court to be, for all intents and purposes, equivalent to a permanent injunction because among other reasons, there were no facts in dispute. (*Keefe* at 418, n. 1.) Here, of course, both parties acknowledge that there are hotly disputed facts.

** *Carroll* v. *Commissioners of Princess Anne*, 393 U.S. 175, 181, n. 5 (1968).

Mr. Chief Justice Hughes in *Near* v. *Minnesota*, 283 U.S. 697, 713 (1931), wherein he stated, for the Court:

> "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication."

In *Near*, this Court struck down an injunction which prevented the publishers of a newspaper from printing a "malicious, scandalous or defamatory newspaper" because it did constitute a prior restraint.

Although the facts and/or the competing interests have varied in each prior restraint case to come before this Court, the holding of *Near* has never been diluted; it has been ever re-enforced. In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963) no injunction against expression had issued, but a state-supported system of informal censorship was struck down, with the Court noting that: "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." And in *Carroll* v. *Commissioners of Princess Anne, supra*, this Court reversed an order which restrained a white supremacist group from holding a rally, notwithstanding the fact that the subject and participants in the rally suggested the possibility of a "clear and present danger" of physical violence.

More recently, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971) this Court again asserted that a party seeking such injunctive relief against expression "carries a heavy burden of showing justification for the imposition of such a restraint." The facts and reason-

ing in the *Keefe* case are most applicable to the case at bar as they demonstrate that a right to privacy will not easily displace First Amendment rights from their favored position. There, the defendants engaged in the distribution of leaflets protesting the alleged "blockbusting" activities of the plaintiff; the site of the leafletting was a suburb in which the plaintiff lived, seven miles from the business district where he had his office. Plaintiff obtained the order preliminarily enjoining defendant from leafletting in the suburb, on the ground that the proximity of these activities to his home constituted an invasion of privacy. In reversing the injunction, this Court by Mr. Chief Justice Burger reasoned the facts of the case as follows:

> "Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record . . . respondent is not attempting to stop the flow of information into his household, but to the public." (at 419-420)

The Court's most recent opportunity to consider the issue of prior restraints was the case of *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). There, in a *per curiam* decision (for six concurring Justices) this Court reversed an injunction granted by the Court of Appeals for the Second Circuit because it was found that the government had not met the heavy burden to justify the imposition of a prior restraint upon the publication by *The New York Times* of the Pentagon Papers. Although the Justices in the Pentagon Papers case differed as to whether the restraint issued by the Circuit Court, pending review by this Court, was proper or unconstitutional, "every mem-

ber of the Court, tacity or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional."* While the Chief Justice dissented in the Pentagon Papers case, he opened his dissenting opinion in *New York Times Co., supra,* at 748 as follows:

> "So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near* v. *Minnesota,* 283 U.S. 697 (1931), until recently in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication."

Cases where this Court has rejected a contention that an improper prior restraint has issued are few. Respondent appears to rely on *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973) as one such case. There, the Court by Justice Powell found not that a prior restraint was permissible, but that there was no prior restraint. In discussing this issue, Mr. Justice Powell noted that:

> "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." (at 390)

There, the Court found that there was not a prior restraint of First Amendment expression because no interim relief

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* *Pittsburgh Press Company* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 396 (1973) (Chief Justice Burger dissenting).

was granted, the speech involved was found to be commercial speech under the exception of *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942) and because the Court was not called upon to speculate as to the effect of publication.

Equally misplaced is respondent's reliance on *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957) and *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971). Both of those cases dealt with obscene materials and rested on this Court's holding in *Roth* v. *United States*, 354 U.S. 476, 481 (1957) that "obscenity is not protected by the freedoms of press and speech."*

To date, therefore, restraints such as the one present here have not been sanctioned by this Court. The AAP submits that the facts here simply do not fall within any of the narrow exceptions suggested in *Near* and reviewed by Mr. Justice Brennan in his concurring opinion in the Pentagon Papers case. Absent one of these exceptions, "the First Amendment tolerates absolutely no judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result."**

In view of the foregoing, the AAP submits that respondent simply has failed to meet the "heavy presumption" against prior restraints of expression.

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* See *New York Times Co.* v. *United States*, *supra* at 726, n.1 (Justice Brennan concurring).

** *New York Times Co.* v. *United States*, *supra* at 725, 726 (Justice Brennan concurring).

POINT III

Only different findings of fact could warrant the injunction imposed below.

There is no question but that Special Term specifically found that the steps taken by petitioners "reasonably meet the usual standards" for disguising the respondent's identity and that respondent is not identifiable. As we have argued above, this record thus affords no basis to overcome the First Amendment prohibitions against prior restraints.

Notwithstanding these clear findings below, respondent seeks to relitigate those factual issues in this forum. Of course, whether this Court feels a duty to engage in fact finding at this stage is within its discretion. The AAP submits, however, that the injunction cannot be preserved on the basis of the record herein and the findings below.

The respondent can possibly overcome the heavy presumption against prior restraints, the AAP respectfully suggests, only if this Court makes its own factual findings that: (1) no consent was given, (2) respondent is identifiable as the subject of the book, (3) petitioners were at fault in failing to take reasonable steps to disguise the identity of the respondent in a work which on its face is clearly intimate, embarrassing and injurious and (4) respondent will suffer "direct, immediate and irreparable" damage if distribution is not enjoined.

In sum, to prevent a chilling effect on this type of expression in the future, the Court should: (1) apply nothing short of the same strict standard of harm which it required of the government in the Pentagon Papers case, *supra* at 730 (Justice Stewart concurring), and (2) impose on the

publisher no more than the obligation of reasonable prudence in the face of material which "makes substantial danger to reputation apparent" than it did in *Gertz, supra,* at 5131, n. 11, citing *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 155 (1967).

The AAP submits that only this suggested approach can prevent claims of and concerns with personal privacy from colliding head on with the First Amendment and creating yet another intractable problem with which publishers and others, including the judiciary, will be faced in the future.

Above all, however, the AAP fears any encroachment on the time-honored constitutional prohibitions against prior restraints. Respondent has, on the basis of the record and findings herein, failed to overcome the heavy constitutional presumption that this Court has always applied. Accordingly, the AAP urges this Court to vacate the injunction and remand the case for prompt trial.

Conclusion

In view of the foregoing, the AAP respectfully requests that the injunction granted below be vacated.

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